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No. 09-334

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF WISCONSIN EX REL.,
SCOTT A. HEIMERMANN,
Petitioner,

v.

JOANNE SWYERS,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Wisconsin District IV

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In urging this Court to refuse to hear the injustice in Petitioner Scott Alan Heimermann's case, Respondent Joanne Swyers emphasizes her reasons for why she should freely be allowed to trample on Heimermann's Constitutional rights. In her Response Brief to this Court, Swyers argues that Heimermann "no longer couches the evidence sought in terms of Piscitello's allegedly exculpatory testimony. This may be owing to Petitioner's acknowledgment that he obtained and presented to more than one reviewing court multiple affidavits by Piscitello but was unsuccessful in persuading any court that Piscitello's evidence warranted his release from prison." (Swyers' Response Brief at 9.) Swyers also claims "[w]hat Petitioner essentially requests is that this Court provide him with additional post-conviction access to the courts". (Swyers' Response Brief at 20.) In this view, Swyers apparently thinks that since Heimermann was eventually able to get a hold of "multiple affidavits" from Piscitello *after* 1999, and at the same time had access to post-1999 postconviction and habeas courts, even though those courts those courts never allowed discovery or an evidentiary hearing to prove Heimermann's substantive claims, that Swyers is somehow liability proof under ***Heck v. Humphrey*** for her reckless and callous indifference to Heimermann's Constitutional right prior to and during

the 1999 habeas corpus proceeding in state court.[1] That is nonsense.

ARGUMENT

At the state level, Swyers acknowledges that Heimermann made two arguments that are now part of debate in this Court. These arguments were (1) that Heimermann had a right under the Fourteenth amendment's Due Process Clause to obtain access to the exculpatory information from informer Piscitello; and (2) that Respondents had intentionally blocked him adequate access to a 1999 habeas corpus proceeding in state court on Respondents' intentional

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[1] Swyers also touts the 'as-yet-undisclosed state evidence' as "problematic for a number of reasons". According to Swyers, "[t]hese records are not subject of Petitioner's Complaint allegations or claims against Respondent nor were these claims addressed by the court below." (Swyers' Response Brief at 9.) However, following Piscitello's alleged death in September 2006, warranted Heimermann filing a motion in the Dane County Circuit Court to compel the release of the as- yet-undisclosed state evidence on February 5, 2007. (Pet. for writ of cert. at 18.) This motion was premised on the Respondents denying Heimermann access to the exculpatory information from Piscitello, hence in light of Piscitello dying before his testimony could be utilized at an evidentiary hearing in court, Heimermann argued in his Petition that the Respondents should be required to replace Piscitello's testimony with the as-yet-undisclosed state evidence via a court order for injunctive relief for which Heimermann also requested in his sworn complaint (see Complaint at p. 47), to remedy the injury resulting from the Respondents' violation of Heimermann's postconviction right to access the exculpatory information from Piscitello. (Pet. for writ of cert. at 13-14, 18, 29.) *See* e.g., ***Edwards v. Balisok***, 520 U.S. 641, 648-49 (1997). So contrary to Swyers' argument, Heimermann did in fact present the analysis of this claim in the courts below and in his sworn complaint.

failure to find Piscitello on behalf of Heimermann like they agreed to do. (App. to pet. for writ of cert. at 7a-8a, 26a-27a: R. App. 9a, 11a-12a.) Now in her Response Brief Swyers contends that Heimermann abandoned the first claim in his Petition. (Swyers' Response Brief at 9.) While the two issues vary, Heimermann did not abandon the first claim in his Petition. The common theme is that they both stem from the Respondents repeatedly denying Heimermann access to the exculpatory information from Piscitello in 1999 when Heimermann had a pending substantive habeas claim for which this exculpatory evidence was material and that the Wisconsin courts denied both claims solely on the basis of ***Heck v. Humphrey,*** 512 U.S. 477 (1994). (App. to pet. for writ of cert. at 7a-8a, 26a-27a: R. App. 9a, 11a-12a.) Therefore, this Reply Brief will only address the new points Swyers raised in her Response regarding the alleged abandonment of the due process right to exculpatory information of Piscitello claim. Because the remaining points in Swyers Response present no special reason, justifying a reply, Heimermann respectfully incorporates in this Reply Brief by reference those arguments in his petition for writ of certiorari.

I. THE WISCONSIN COURTS' CONCLUSIONS CONFLICT WITH THE DECISIONS OF THIS COURT AND ITS PROGENY.

Swyers' argument on Heimermann's due process right to exculpatory postconviction evidence claims is that he has not demonstrated a conflict between this Court's precedent and the decisions of the Wisconsin Court of Appeals. (Swyers Response Brief at 12-15.) According to Swyers, Heimermann "mischaracterizes

the holding and applicability" of this Court's holding in **District Attorney's Office For The Third Jud. Dist. v. Osborne**, __ U.S. __, 129 S. Ct. 2308, 2009 U.S. LEXIS 4536 (2009). (Swyers' Response Brief at 14.) Contrary to Swyers' argument, however, Osborne and its progeny did not rule that a prisoner's postconviction access-to-evidence claim brought under § 1983 is barred under ***Heck***. 129 S. Ct. at 2318-19. While Swyers is correct in saying that ***Osborne*** disallowed a substantive and procedural due process right to exculpatory evidence, the question thus was "whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Id.* (quoting ***Medina v. California***, 505 U.S. 437, 446, 448, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992)). This Court ultimately concluded that Osborne was not able "to demonstrate the inadequacy of the state-law procedure available to him in state postconviction relief," hence he had not shown a due process violation. 129 S. Ct, at 2321-22.

On the other hand, the United States District Court for the Southern District of New York recently allowed a claim substantially identical to Heimermann's in ***Newton v. City of New York***, 2009 U.S. Dist. LEXIS 95346 (S.D.N.Y. Oct. 13, 2009). ***Newton*** recognized that its analysis did not directly contradict Osborne. The exclusive rationale of the ***Newton*** holding is to ensure that, "once a state determines that a postconviction defendant is entitled to evidence under [the framework of the state's postconviction procedures], the defendant's due process rights have

been violated if attempts to locate the evidence are unsuccessful due to inadequate training, supervision, and instruction in the procedures necessary to locate the evidence or deliberate ignorance of the storage location in bad faith." *See* 2009 U.S. Dist. LEXIS 95346 at * 43. Thus, Heimermann points to **Newton** as on point to show that Swyers' denying him access to exculpatory evidence in 1999 "transgress principles of fundamental fairness in operation," hence **Osborne** is applicable for Heimermann's postconviction access to evidence claim.

Like ***Newton***, Heimermann's case and ***Osborne*** reflect big factual differences. In ***Osborne***, the plaintiff failed to show he was denied a fair trial and he failed to pursue Alaska's postconviction procedures to access the requested exculpatory evidence. Heimermann has shown how he was denied a fair trial, i.e., wholesale suppression of exculpatory evidence by the state, and he has repeatedly pursued Wisconsin's procedures (in various ways) and has shown them to be a repetitive exercise of futility. So applying ***Newton*** and ***Osborne*** to Heimermann's postconviction access to exculpatory evidence claims are supportive to his case. First, for Heimermann to be able to state a claim for due process violation relating to the exculpatory information from Piscitello, he must show (1) the existence of a protected liberty interest and (2) that Wisconsin's procedures for protecting that interest violate a fundamental principle of justice or are fundamentally unfair. In his petition for writ of certiorari, Heimermann has shown that he has a liberty interest, i.e., that Wisconsin state law provides a right comparable to that in Alaska to be released upon an invalid conviction based on newly discovered evidence. *See generally* Wis. Stat. § 782.01 (providing

for discharge from custody upon petition for writ of habeas corpus when there is no legal cause for petitioner's imprisonment or restraint). (Pet. for writ of cert. at 19- 20.) In addition, Heimermann has a right to postconviction access to evidence in Wisconsin pursuant to ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W. 2d 8 (1999). (Pet. for writ of cert. at 14-15.)

The second thing Heimermann must show is that the consideration of his claim within the framework of Wisconsin's postconviction access procedures "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *See* 129 S. Ct. at 2320 (citation omitted). As shown below, Heimermann has raised a question of material fact as to whether Wisconsin's procedures for postconviction access to evidence, combined with Swyers denying him access to exculpatory information from Piscitello in 1999 for invalidating his 1991 convictions, "transgress principles of fundamental in operation".

Heimermann -- like in **Newton** -- raises a material question of fact as to whether the exculpatory information from Piscitello and the "as-yet-undisclosed state evidence" could have been obtained because the Respondents failed to follow through with their promises to help Heimermann find Piscitello in 1998 so that Heimermann could have used that exculpatory information in time during a 1999 habeas corpus proceeding in state-court.

Heimermann had an ongoing due process claim that triggered the postconviction discovery concerns he has raised in his Petition. On February 12, 1999,

Swyers was called to testify under oath in ***State of Wisconsin ex rel. Scott A. Heimermann v. Bradley G. Gehring***, Outagamie County Circuit Court, State of Wisconsin, and case No. 99-CV-72, a state-court habeas corpus action commenced by Heimermann. (the "1999 state habeas corpus case"). The state-court asked Swyers about her role in promising to find Piscitello and obtain exculpatory information from Piscitello regarding Heimermann's innocence:

> "SWYERS: I do want to add there was one thing I agreed to do for him.
>
> THE COURT: What was that?
>
> SWYERS: He was trying desperately to locate an inmate by the name of Piscitello who was his co-defendant in is convictions, and he was a protected federal witness, and he was looking for that location, and I did agree, he wanted me to ask the U.S. Attorney if there was a way he could get an affidavit from Mr. Piscitello and I asked the U.S. Attorney, and she was not interested in pursuing that."

(Habeas hearing transcript, Feb. 12, 1999 at 13-14.)

Heimermann then went on to cross-examine Swyers:

"HEIMERMANN: Okay. Did there ever come a time in my capacity of assisting you and the others where you were presented with documentation concerning my protestations of innocence in the criminal matter?

SWYERS: Yes. You inundated me with documents about that matter."

(Habeas hearing transcript, Feb. 12, 1999 at 15-16.)

A few minutes later during the 1999 state habeas corpus case Heimermann asked Swyers about the underlying promises she and her state confederates made with him to help in the Robert Fecke et al. investigations and with finding Piscitello:

"HEIMERMANN: Ms. Swyers, did I or did I not assist in buy money and giving it to the perpetrators in this case, Mr. Fecke, where he then took the money out of the institution and presented it to my Mother? Was hat not part of the deal?

SWYERS: Was that not part of what?

THE COURT: The deal.

HEIMERMANN: The deal.

SWYERS: Yes.

HEIMERMANN: Other than what you had requested for me to do, there was no other matters for me to do, correct?

SWYERS: Yes, there was.

HEIMERMANN: And in what regard?

SWYERS: After the money was accepted the guard [Fecke] was supposed to provide you with a phone number, a name, and address to use to contact him through, and that was Mr. Patzer, and you were supposed to arrange a meeting between Mr. Patzer and the undercover DEA agent, at which time you revealed our investigation to Mr. Patzer and ended our investigation.

HEIMERMANN: How did I reveal your investigation? Let me back up. Did I provide you the number for Mr. Patzer?

SWYERS: Yes."

(Habeas hearing transcript, Feb. 12, 1999 at 19-20.)

Swyers did not mention the existence of "Mr. Patzer" being the sole Plaintiff in ***Thomas R. Patzer v. State of Wisconsin Department of Corrections and Dodge County Sheriffs Department***, Dodge County Circuit Court, State of Wisconsin, case no. 98-SC-811, a state-court small claims actions against Swyers and her state counterparts. There, Mr. Patzer alleged under oath in his civil complaint that:

> "On July 3, 1998, your Plaintiff was retained by Robert Fecke on behalf of Scott A. Heimermann for investigative services in conjunction to Mr. Heimermann's appeal from a criminal conviction. On July 14, 1998, your Plaintiff entered into a written contract with Mr. Heimermann for investigative services to be rendered at $40.00 per hour, plus all out-of-pocket expenses .... In his capacity as an 'confidential informant' [at the time Mr. Heimermann entered into the written contract with your claimant; said signing of said contract was predicate to the carrying out of [Respondent] Dehann and Swyers' overall objective against the Plaintiff."

(Patzer sworn civil complaint at ¶¶2,9.) Thus the fact that Swyers and Respondent Dehaan had persuaded Heimermann to retain Patzer *on the pretext* as a private investigator in Heimermann's efforts to find Piscitello during the undercover investigation of Fecke et al. and at the same time Swyers monitoring every move of Patzer via Heimermann's undercover services in that investigation raises a meritorious claim that Swyers and her state confederates knew all along of

Patzer ultimately determining Piscitello to be somewhere in "the State of Florida Department of Corrections system via Inter-State transfer from Wisconsin Department of Corrections system on April 3, 1996,"[2] but at the same time Wisconsin corrections had denied Patzer access to Piscitello's true location in Florida on account of his witness protection status, hence Swyers recklessly and callously denied Heimermann access to Piscitello for the 1999 habeas corpus proceeding in state court.

Therefore, contrary to Swyers, this case is wholly distinguishable from the factual circumstances in ***Osborne:*** Here, over a decade ago, Heimermann repeatedly requested postconviction access to information from longtime informer Piscitello and for which that information was denied -- not because the courts said Heimermann wasn't entitled to the exculpatory information of Piscitello, but because Swyers reneged on promises to aid Heimermann in finding Piscitello and obtain exculpatory information from him in 1998. As it turns out, Piscitello was always in a location within the custody of the Respondents at the time which Swyers and State Respondents agreed to help Heimermann find Piscitello -- even telling the 1999 state-habeas court she couldn't locate Piscitello because the "U.S. Attorney was not interested in pursing that."

Translation: Basically, Swyers' "the U.S. Attorney was not interested in pursuing that" statement means that Swyers hew all along of Piscitello's location but at

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[2] 1664: App to pet. for writ of habeas corpus 42. Note see meaning of prefix "1664" in Heimermann's Petition at 4, n.4.

the same time was deliberately indifferent of the location of Piscitello and in helping Heimermann clear his name in a crime he did not morally and technically commit. Without accurate information of Piscitello's location and his exculpatory information against Milwaukee law enforcement and prosecutors, including the 'as-yet-undisclosed state evidence' Heimermann was unable to prove "that Milwaukee law enforcement facilitated the circumstances that led to the deaths of Binwalee and Russell, not Heimermann"[3] at the 1999 state habeas corpus case, hence Swyers and State Respondents are seeking to keep an innocent man in prison. *See* Dan Markel, *DA's Office* v. Osborne: Bad Facts Make Tough Cases, Prawfsblawg, June 19, 2009, http://prawfsblawg.blogs.com/prawfsblawg/2009/06/das-office-v-osborne-bad-facts-make-though-cases-html (arguing that lower courts and the Supreme Court in future cases can reasonable restrict Osborne's holding to situations in which there is strong evidence of strategic manipulation by litigants; *the holding need not naturally extend to those cases where the defendant's claim of actual innocence are more plausible than Osborne's claims were*).

Since Heimermann raises a question of material fact as to whether Wisconsin's procedures for postconviction access to exculpatory evidence, combined with Swyers' denying Heimermann access to exculpatory evidence, it "transgresses [a] principle of fundamental fairness in operation." So read in the context of ***Newton*** and ***Osborne***, a conflict clearly exists between this Court's precedent and the decisions

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[3] *See* Heimermann's pet. for writ of cert. at 19.

of the Wisconsin courts barring Heimermann access to exculpatory postconviction evidence under ***Heck***.[4]

CONCLUSION

For the reasons state above, Scott Alan Heimermann respectfully requests that this Court grant the petition for writ of certiorari and order that the injustice in this case be rectified at long last.

Respectfully submitted,

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[4] Swyers, who is apparently making an attempt to dodge this Court's holding in ***Edwards v. Balisok***, 520 U.S. 641 (1997), also argues to this Court that Heimermann failed to seek any form of injunctive relief in his complaint. (Swyers' Response Brief at 16.) This statement of Swyers is not true. Heimermann's sworn complaint plainly requested the court to "immediately issue a temporary restraining order directing to depose Edward J. Piscitello as soon as possible because his testimony is cretical to Plaintiff being released . . . ." (Complaint at p.47.) Because Heimermann did request injunctive relief in his complaint, combined with the fact that the Wisconsin courts denied Heimermann's claims under ***Heck***, demonstrates also that Heimermann has shown a conflict between the Wisconsin courts' decisions and this Court's holding of ***Edwards v. Balisok***, 520 U.S. at 648-49. *See also Introduction Section, supra*, at 1, n.1.

PETITION FOR RE-HEARING

No. 09-334

In The
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SCOTT A. HEIMERMANN,

Petitioner

Vs.

GARY R. McCAUGHTRY, ET AL.

Respondents

Supreme Court, U.S.
FILED
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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN DISTRICT IV

PETITIONER'S PETITION FOR REHEARING

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INTRODUCTION

This Court denied Petitioner Scott A. Heimermann's ("Heimermann") Petition for Writ of Certiorari("Petition") on November 2, 2009, 2009 U.S. LEXIS 7747, 78 U.S.L.W. 3251, and he now respectfully petitions for rehearing of that order denying certiorari. Specifically, Heimermann asks for an order (1) granting rehearing and (2) remanding the case to the Court of Appeals of Wisconsin District IV. If the Court is unwilling to remand the case for better development of the record as to whether Heimermann's unsuccessful postconviction litigation history is owing to Respondents' cover-up of alleged Fourteenth Amendment violations and on the nature of the Wisconsin Court of Appeals affirming dismissal of Heimermann's sworn civil rights complaint, pursuant to ***Heck v. Humphrey***, 512 U.S. 477, 114 S. Ct. 2364 (1994), with prejudice, Heimermann would alternatively request that the Court grant certiorari and set this case on the Court's docket for argument and briefing so that it can resolve the Questions Presented.

Because Supreme Court Rule 29.4 and 28 U.S.C. § 2403(a) may apply, the Solicitor General of the United States has been served with this petition.[1]

GROUNDS FOR REHEARING

Although this Court almost never grants petitions for rehearing, this case meets the rare exception contemplated by Supreme Court Rule 44.2. This most extraordinary relief will not be granted unless there is a "reasonable likelihood of this Court's reversing its previous decision and granting certiorari." ***Richmond v. Arizona***, 434 U.S. 1323, 98 S. Ct. 8 (1977)(Rehnquist, J., in Chambers).

[1] The Solicitor General had also been served with Heimermann's Petition for Writ of Certiorari and Reply Brief in this case.

In arguing for rehearing, Heimermann points to three areas: (1) the Court of Appeals of Wisconsin improperly affirmed dismissal of Heimermann's sworn civil rights complaint, pursuant to ***Heck***, with prejudice; (2) the Court of Appeals of Wisconsin improperly endorsed the application of the ***Heck*** rule without first commencing fact-finding as a prerequisite on whether Heimermann's unsuccessful postconviction litigation is due to Respondents' cover-up of alleged Fourteenth Amendment violations relating to Heimermann's 1991 convictions;[2] and (3) extraordinary relief is warranted pursuant ***In Re Davis***, 174 L. Ed. 2d 614, 2009 U.S. LEXIS 5037 (2009). Heimermann therefore respectfully, and humbly, submits that rehearing is warranted.

I. REHEARING IS WARRANTED IN LIGHT OF THE FACT THAT THE PROPER ROLES OF COURTS IN CASES ON *HECK* GROUNDS WARRANT ONLY DISMISSAL WITHOUT PREJUDICE.

The Wisconsin circuit court dismissed Heimermann's sworn civil rights complaint, pursuant to ***Heck v. Humphrey***, 512 U.S. 477, 114 S. Ct. 2364 (1994), with prejudice. (Petitioner's Appendix [P. App.] at 31a.) Likewise, the Wisconsin Court of Appeals concluded that dismissal with prejudice was warranted in Heimermann's case. (P. App. at 2a.)

The proper roles of courts in cases on *Heck* grounds, however, warrant only dismissal *without* prejudice because the suit may be reinstated should the prisoner's

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[2] The Fourteenth Amendment violations are based on Respondents' official cover-up of exculpatory information during a 1999 habeas corpus proceeding in state court where the basics of that exculpatory information eventually showed a concerted effort by Milwaukee police detectives Barry Debraska Jr. and Brian O'Keefe, along with their longtime informant, Edward J. Piscitello, being responsible for the scapegoating of Heimermann for the August 19, 1989 double homicides of Mohammad Binwalee and Dion Russell. (Petition at 4 n.3, 5-7, 11 n.5, 18-19, P. App. at 7a-8a, 21a-22a). *See also* ***Devereaux v. Abbey***, 263 F.3d 1070, 1074-75 (9th Cir. 2001)(en banc)(holding that there is a clearly established Constitutional right due process right not to be subjected to criminal charges based on deliberately fabricated evidence); ***Limone v. United States***, 579 F.3d 79, 94-95 (1st Cir. 2009)("FBI agents knowingly participating in the events leading to the wrongful indictment, prosecution, conviction, and continued incarceration of the scapegoats" subject to due process analysis for outrageous government conduct).

conviction be "expunged by executive order, declared invalid by a state tribunal authorized to make such determinations, or called into question by a federal court's issuance of a writ of habeas corpus." ***Heck***, 512 U.S. at 487; *see also* ***White v. Gittens***, 121 F. 3d 803, 807 (1st Cir. 1997); ***Fottler v. United States***, 73 F. 3d 1064, 1065-66 (10th Cir. 1996); ***Perez v. Sifel***, 57 F. 3d 503, 505 (7th Cir. 1995)(per curiam); ***Trimble v. City of Santa Rosa***, 49 F. 3d 583, 585 (9th Cir. 1995)(per curiam); ***Schafer v. Moore***, 46 F. 3d 43, 45 (8th Cir. 1995).

Here, Heimermann desires to commence a separate action by alleging the aforementioned Fourteenth Amendment violations in a comprehensive original petition for writ of habeas corpus pursuant to ***In Re Davis***, 174 L. Ed. 2d 614, 2009 U.S. LEXIS 5037 (2009). (*See* Section III, *infra*.) That, of course, means that there is a very real possibility that Heimermann may succeed in overturning his 1991 convictions. Therefore, the Wisconsin Court of Appeals' decision that the dismissal be with prejudice offends the authority under ***Heck***, as the lawsuit against the Respondents may be reinstated after Heimermann's convictions are "expunged by executive order, declared invalid by a state tribunal authorized to make such determinations, or called into question by a federal court's issuance of a writ of habeas corpus." ***Heck***, 512 U.S. at 487. Accordingly, the Petition for Rehearing should be granted.

II. REHEARING IS WARRANTED IN LIGHT OF THE WISCONSIN COURT OF APPEALS' IMPROPERLY ENDORSING THE APPLICATION OF THE *HECK* RULE WITHOUT FIRST COMMENCING FACT-FINDING AS A PREREQUISITE ON WHETHER HEIMERMANN'S UNSUCCESSFUL POSTCONVICTION LITIGATION HISTORY IS OWING TO THE RESPONDENTS' COVER-UP OF FOURTEENTH AMENDMENT VIOLATIONS RELATING TO HEIMERMANN'S 1991 CONVICTIONS.

The Wisconsin Court of Appeals' decision was grounded in Heimermann's unsuccessful postconviction litigation history. That court's decision called into question Heimermann having "filed approximately thirty-nine appeals and writs in [the Wisconsin Court of Appeals] since 1991". (P.App. at 3a, ¶3 n.1.) In his Petition to this Court, Heimermann expresses reason for his post-1999 unsuccessful postconviction litigation is that official cover-up by Respondents inherently caused his futility in the litigation. (Petition at 9-18.) In most, if not all respects Heimermann's unsuccessful postconviction litigation history and documented record of courts repeatedly denying Heimermann postconviction relief would arguably *originate* from Respondents obstructing Heimermann access to exculpatory evidence from longtime informant Edward J. Piscitello during a 1999 habeas corpus proceeding in state court. (P. App. at 7a-8a, 21a-22a.)

On February 12, 1999, Swyers was called to testify under oath in ***State of Wisconsin ex rel. Scott A. Heimermann v. Bradley G. Gehring***, Outagamie County Circuit Court, State of Wisconsin, and case no. 99-CV-72, a state-court habeas corpus action commenced by Heimermann. The state-court asked Swyers about her role in promising to find Piscitello and obtain exculpatory information from Piscitello regarding Heimermann's innocence:

"SWYERS: I do want to add there was one thing I agreed to do for him

THE COURT: What was that?

SWYERS: He was trying desperately to locate an inmate by the name of Piscitello who was his co-defendant in his convictions, and he was a protected federal witness, and he was looking for that location, and I did agree, he wanted me to ask the U.S. Attorney if there was a way he could get an affidavit from Mr. Piscitello and I asked the U.S. Attorney, and she was not interested in pursuing that."

(Habeas hearing transcript, Feb. 12, 1999 at 13-14.)

Heimermann then went on to cross-examine Swyers:

"HEIMERMANN: Okay. Did there ever come a time in my capacity of assisting you and the others where you were presented with documentation concerning my protestations of innocence in the criminal matter?

SWYERS: Yes. You inundated me with documents about that matter."

(Habeas hearing transcript, Feb. 12, 1999 at 15-16.)

A separate civil action also was filed against Swyers and her state counterparts by Thomas R. Patzer, who was a target in the investigations Swyers was conducting with state prison officials in 1998. (Swyers' brief at 3.) *See* ***Thomas R. Patzer v. State of Wisconsin Department of Corrections and Dodge County Sheriff's Department***, Dodge County Circuit Court, State of Wisconsin, case no. 98-SC-811. Mr. Patzer alleged under oath in his civil complaint that:

> "On July 3, 1998, your Plaintiff was retained by Robert Fecke on behalf of Scott A. Heimermann for investigative services in conjunction to Mr. Heimermann's appeal from a criminal conviction. On July 14, 1998, your Plaintiff entered into a written contract with Mr. Heimermann for investigative services to be rendered at $40.00 per hour, plus all out-of-pocket expenses . . . In his capacity as an 'confidential informant' [at the time Mr. Heimermann entered into the written contract with your claimant: said signing of said contract was predicate to the carrying out of [Responcent] Dehann and Swyers' overall objective against the Plaintiff."

(Patzer sworn civil complaint at ¶¶2,9.)[3]

The fact that Swyers and Respondent Dehaan had advocated that Heimermann hire Patzer *on the pretext* as a private investigator in Heimermann's efforts to find Piscitello during the undercover investigation of Fecke et al. makes Swyers' "the U.S. Attorney was not interested in pursuing" Piscitello testimony as the basics of Heimermann's claim for official cover-up of Fourteenth Amendment violations during the 1999 habeas corpus proceeding. (P. App. at 7a-8a, 21a-22a.) In this case, Swyers knew via tracking Patzer's movements in the Fecke et al. investigations that Piscitello was not in the custody of the feds, but rather, that Piscitello was transferred by the Wisconsin Department of Corrections to a penal institution in the state of Florida in April 1996. However, under the circumstances presented with Piscitello's protection status, the Florida corrections system would not permit Patzer to make contact with Piscitello without permission from the Wisconsin corrections department. In short, Swyers' purported explanation for not providing Heimermann access to Piscitello's information in 1999 precluded him from invalidating his convictions pursuant to ***Heck***.

For obvious reasons the Respondents' obstruction of justice at the 1999 habeas corpus proceeding would seem to be a factor weighing heavily in causing Heimermann to behave and litigate in ways that pre-empted success for him in the courts since 1999. In considering claims for official cover-up of Constitutional violations, courts have decided against applying the ***Heck*** rule. *See* ***Cabrera v. City of Huntington***, 159 F. 3d 374, 380-81 (9th Cir. 1998). In the present case, the Wisconsin Court of Appeals applied ***Heck***

[3] This information of Patzer's lawsuit against Swyers et al. can also be confirmed by this Court taking judicial notice of the Wisconsin Circuit Court Access Program available at *http://wcca.wicourts.gov/index.xsl*

without first determining whether Heimermann's post-1999 unsuccessful postconviction litigation history flowed from the Respondents' cover-up of alleged Fourteenth Amendment violations relating to Heimermann's convictions at the 1999 habeas corpus proceeding.

In helping this Court evaluate the sufficiency of the access to courts claims, by way of analogy, there is the 1970s-era price ceiling on gasoline. By causing prices at the pump to lie about the scarcity of oil, that price ceiling led Americans to waste untold hours waiting in lines to fuel their cars. Similar waste occurs when official cover-up succeeds for a time in a criminal defendant's postconviction efforts. Here, Swyers and her state prison confederates succeeded for a time in hiding the existence of important evidence from informer Piscitello that directly addressed the aforementioned Fourteenth Amendment violations about Milwaukee law enforcement being responsible for the scapegoating of Heimermann in the murders of Binwalee and Russell.

In her brief to this Court, Swyers advocated that there should be no importance attached to Heimermann's Fourteenth Amendment claims because he has been "unsuccessful in persuading any court that Piscitello's evidence warranted his release from prison". (Swyers' brief at 9.) In light of the fact that the courts have never held an evidentiary hearing on Piscitello's information, it is not clear why the courts have repeatedly refused to grant Heimermann's release on Piscitello's evidence, but perhaps it is because Piscitello seems like an individual the courts do not find credible, particularly if he has a proven status as a liar. (Petition at 3-4.) In any event, that perception should have changed in 2007 when Heimermann had discovered independent documentary parts of Piscitello's postconviction information in which is based upon Milwaukee law

enforcement facilitating the release from custody of murder victim Binwalee for the apparent war on drugs against Binwalee and his gang in 1989. (Petition at 13.) Therefore, that 2007 independent finding became the game-changer. It self-validated Piscitello's 2002 information in which he states "[s]everal weeks before the double homicide occurred, I personally learned through my law enforcement handlers that Mr. Binwalee had been arrested by Milwaukee police on a traffic violation, and later, after Detective Debraska learned of Mr. Binwalee's arrest, he cut a deal and let him back on the street in order for us to tail him to see what else he would be up to," Piscitello wrote. (Piscitello affidavit Sept. 10, 2002, ¶ 10.)[4] In other words, if Piscitello had intended to fabricate any of the information he provided in 2002, he would have had to know years before that the 1989 release from custody of Binwalee was not a sure-fire bet.

Heimermann has also sought access to the "as-yet-undisclosed state evidence" consisting of "records presumably still being withheld by the county prosecutors and Milwaukee law enforcement". (Petition at 13-14.) This new evidence would also help cement Piscitello's truthfulness in his various affidavits. Such as-yet-undisclosed state evidence would track what Milwaukee law enforcement knew during the 1989 timeline when informer Piscitello initiated contact with naïve Heimermann in mid-April 1989 and thereafter used him as an unwitting front person in the days leading to the murders of Binwalee and Russell. (Petition at 2-3,13-15.)

So the evidence is there to prove Piscitello and his Milwaukee law enforcement handlers framed Heimermann for the 1989 homicides of Binwalee and Russell. Therefore, in the context of Sawyers' arguing that Heimermann 'was unsuccessful in persuading any court that Piscitello's evidence warranted his release from prison" is

[4] See 1994 App. to pet. for writ of habeas corpus, 55-56 (Petition at 9-10).

actually a validation that Swyers covered-up Milwaukee law enforcement misdeeds postconviction by obstructing Heimermann's repeated efforts to clearing his name since his 1999 habeas corpus proceeding.

In short, the overall claim of Respondents' cover-up of Fourteenth Amendment violations concerning Milwaukee law enforcement knowingly participating in the 1991 events leading to the wrongful charging, prosecution, conviction, and continued imprisonment of Heimermann is not barred under *Heck* pursuant to *Cabrera*. *See* 159 F. 3d at 381. The remedy therefore is remanding the case to the Wisconsin Court of Appeals for fact-finding on whether Heimermann's unsuccessful postconviction litigation flowed from Respondents' cover-up of these Fourteenth Amendment violations in order to ensure that this Court has before it a fully developed factual record in a concrete case. Accordingly, the Petition for Rehearing should be granted.

III. REHEARING IS APPROPRIATE WHERE OTHER GROUNDS SUFFICE TO JUSTIFY HEIMERMANN'S REQUEST FOR EXTRAORDINARY RELIEF.

Finally, rehearing is warranted where, as here, substantial grounds to overturn Heimermann's 1991 convictions exist, underscoring that the Wisconsin Court of Appeals' decision in affirming dismissal of Heimermann's sworn civil complaint, pursuant to *Heck*, with prejudice, is in itself a momentous injustice, because such a decision now precludes Heimermann from ever obtaining any damages resulting from Respondents' obstruction of justice in 1999. (Petition at 30-31.)

Swyers has indicated that allowing Heimermann to file another postconviction or habeas actions would be "relief unique to Petitioner's circumstances born of years and years of post-conviction litigation" (Swyers' brief at 20.) But in applying the above-cited

Davis factors in this case. *Davis* also had unsuccessfully pursued "years and years of post-conviction litigation" based on same or similar claims. Still, this Court took the extraordinary step of ordering a district court to hold an evidentiary hearing for a determination of whether the Petitioner had made a showing that clearly establishes his innocence of the crime for which he was convicted by demonstrating that seven of the state's witnesses against Davis recanted their trial testimony via postconviction affidavits. *See* 2009 U.S. LEXIS 5037 at *1 (Stevens J., concurring). Heimermann's case is very much similar to the factual circumstances presented in ***Davis*** (including, incidentally, that both alleged crimes in ***Davis*** and Heimermann cases happened on August 19, 1989).

During Heimermann's 1991 prosecution, the State told the trial court and jury that Heimermann knowingly played an important role with Piscitello to murder Binwalee and Russell. (Petition at 5-7.)

Piscitello, a longstanding informant who was on Milwaukee law enforcement's payroll during the time of the August 19, 1989 murders, and who participated with Milwaukee police in the events leading to the wrongful arrest and murders charged of Heimermann, has postconviction recanted his 1991 testimony to blow the whistle on his employer, and which new evidence now implicates Milwaukee law enforcement in 1989 being responsible for the murders of Binwalee and Russell, as well as knowingly participating in the scapegoating of Heimermann. (Petition at 9-10,18-19.) In short, Milwaukee law enforcement allowed an individual like Piscitello who had known violent tendencies[5] to interact with naïve Heimermann, a former farm boy from rural Chilton,

[5] Milwaukee law enforcement may not have told Piscitello that he could skate out a death sentence to Binwalee and Russell, but Piscitello's free wheeling arrogance and longstanding employment with Milwaukee law enforcement certainly fed into Piscitello's violent tendencies.

and use Heimermann as an unwitting front person in the days leading to the two homicides and afterwards. (Petition at 2-3.)[9]

When considering such a claim of outrageous government conduct the courts generally consider whether "the state exercises coercive power, is entwined in the management or control of the private actor, or provides the private actor with *significant encouragement*, either overt or covert, or when the private actor operates as a *willful participant in joint activity* with the state or its agents, is controlled by an agency of the state, has been delegated a public function by the state, or is *entwined with government policies*." *U.S. v. Stein*, 541 F. 3d 130, 147 (2nd Cir. 2008)(citations omitted). Here, the Wisconsin Court of Appeals understood that based upon the postconviction information from Piscitello "the criminal complaint upon which Heimermann has been convicted should be dismissed with prejudice" because of the "fraud and outrageous government conduct" between Piscitello and Milwaukee law enforcement. (P. App. 7a-8a; *see also* Petition at 18 (quoting sworn civil complaint at ¶¶37-38)). Add to that the common link between Milwaukee police detective Barry Debraska Jr., a vice-squad specialist, Milwaukee police detective Brian O'Keefe, the lead homicide detective in the Binwalee murder, and Piscitello -- Piscitello and Debraska worked at the 1989 drug investigations against Binwalee and his gang; then Debraska, O'Keefe and Piscitello worked the 1991 murder investigation in a scheme to falsify, omit and conceal information about

[9] In her brief to this Court, Sawyer makes much of Heimermann bringing up his "expansive background, beginning with his own upbringing ..." (Sawyer Brief at 2.) Heimermann replies by stating that the State's allegation that he may have been engaged in a double murder is not only based on deliberately fabricated evidence, but it is entirely at odds with the person he really is, which is supported by his good upbringing in rural Chilton. That, and with anything else the State of Wisconsin could have learned about him since 1991, makes strategic sense as to why Heimermann brought up his "expansive background, beginning with his own upbringing" because, it is very relevant to showing that Court his innocence of the crime for which he was convicted.

Heimermann aiding and abetting in the murders of Binwalee and Russell;[7] and then Debraska and O'Keefe were involved in a plot in 1995 to fabricate evidence and to falsely show that Customs Agent Buford Gates covered up the murders of Binwalee and Russell, when Gates did not. (Petition at 9-11.)

Therefore, Piscitello has flat out given himself a leadership role and a level of intimate knowledge of the 1989 drug operations against Binwalee and his gang in the days leading to his murder including his participating in the 1991 events leading to the wrongful arrest and murder charges of Heimermann. There is a clarity and specificity of Piscitello's various affidavits here, along with the aforementioned 2007 independent evidence of Binwalee's release in 1989 and the 'as-yet-undisclosed state evidence,' that combined makes for impressive evidence in overturning Heimermann's 1991 convictions and for this Court reversing course and grant certiorari in this case. Accordingly, the Petition for Rehearing should be granted.

[7] This is part of Piscitello's "arrogance" where he said to Heimermann [r]emember I put you in prison with what was called the perfect crime. Therefore, I can get you out as well!!!" (Petition at 10.)

CONCLUSION

The Court should grant this Petition for Rehearing, and remand the case to the Wisconsin Court of Appeals. Alternatively, this Petition should be granted, the order entered November 2, 2009, denying the Petition for Writ of Certiorari should be vacated, and the Petition for Writ of Certiorari should be granted.

Dated this 25th day of November 2009.

Respectfully Submitted,

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CERTIFICATE OF GOOD FAITH

I hereby certify that I am not a member of the bar of this Court, but I am a party proceeding *pro se*, and that on this 25th day of November 2009, I caused to be filed a Petition for Rehearing. The Petition for Rehearing is presented in good faith and not for delay.

Dated this 25th day of November 2009.

BY: _____
Scott A. Heimermann
Petitioner *pro se*